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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JUAN ANTONIO GONZALEZ, Defendant and Appellant.	C066880 (Super. Ct. No. 10F02830)

Convicted of lewd acts and battery on a child and sentenced to 12 years in state prison, the defendant appeals. He contends: (1) his battery conviction must be reversed because it was a lesser-included offense of a lewd act, (2) the trial court erred by imposing unstayed terms for a lewd act and the battery, (3) the court abused its discretion by failing to state separate reasons for sentencing choices, and (4) the court improperly imposed fees, for his court-appointed attorney and for booking, without evidence of the defendant's ability to pay. We conclude that the fee for his court-appointed attorney must

be stricken. In all other respects, however, we find no prejudicial error and therefore affirm the judgment as modified.

FACTS

On July 20, 2009, the defendant went to his sister's home to celebrate her birthday. His sister invited the defendant to stay and sleep in her son's bed because her son was away. Sleeping in the same room were their mother and the sister's six-year-old daughter, E.R.

During the night, E.R. lay down next to the defendant. The defendant kissed her and put his hand down her pajama bottom and touched what she called her "colita." To her, the term referred to a vagina or penis. The defendant grabbed E.R.'s hand and made her hold and squeeze his penis.

Later, E.R. told her mother what had happened. E.R. told a detective that the defendant had put his hand under her pajamas and underwear and that his finger went inside her two or three times. In a sexual assault forensic examination interview, E.R. said that the defendant had touched her "colita" about four times.

The defendant denied touching E.R. or having her touch him.

PROCEDURE

The district attorney charged the defendant by information with three felony counts: a lewd act on a child by force (defendant's hand on victim's vagina; count one; Pen. Code, § 288, subd. (b)(1)); another lewd act on a child by force (victim's hand on defendant's penis; count two; Pen. Code, §

288, subd. (b)(1)); and sexual penetration (defendant's finger in victim's vagina; count three; Pen. Code, § 288.7, subd. (b)).

The defendant was tried by jury. As to count one, the jury found the defendant guilty of the lesser-included offense of lewd act on a child without force. (Pen. Code, § 288, subd. (a).) As to count two, the jury found the defendant guilty, as charged, of a lewd act on a child by force. And as to count three, the jury found the defendant guilty of the lesser-included offense of misdemeanor battery. (Pen. Code, § 243, subd. (a).)

The trial court sentenced the defendant to state prison for the middle term of six years on count one, followed by a full, separate, and consecutive middle term of six years on count two under Penal Code section 667.6, subdivision (c). For the misdemeanor battery in count three, the court imposed the time served in county jail before sentencing.

DISCUSSION

I

Lesser-included Offense

Count one of the information alleged that the defendant committed a lewd act on E.R. by force ("defendant's hand on victim's vagina"), and count three alleged that the defendant sexually penetrated E.R. ("defendant's finger in victim's vagina").

While discussing jury instructions with counsel, the trial court stated that there could be a Penal Code section 654 or unanimity issue with respect to counts one and three. The

prosecutor disagreed, stating that she would argue that the defendant first touched E.R.'s vagina, then digitally penetrated her. The trial court asked whether the prosecutor would be bound by that argument, and the prosecutor agreed.

During closing argument, the prosecutor argued to the jury that counts one and three addressed separate acts. Count one was a touching by force, then "[c]ount [t]hree is not just the touching of the vagina. It is the actual penetration of the vagina . . . ."

The jury convicted the defendant of lesser-included offenses as to each count. As to count one, the jury convicted the defendant of committing a lewd act, stated as "defendant's hand on victim's vagina" in the verdict form. As to count three, the jury convicted the defendant of battery with no statement of what constituted the crime.

On appeal, the defendant contends that the conviction on count three (battery) must be dismissed because it is a lesser-included offense of the conviction on count one (lewd act). He points out that the issue of whether battery is a lesser-included offense of a lewd act is currently before the California Supreme Court.[1] The contention is without merit, however, because the convictions on the two counts were based on

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[1] *People v. Shockley* (review granted Mar. 16, 2011, S189462); see also *People v. Thomas* (2007) 146 Cal.App.4th 1278; *People v. Santos* (1990) 222 Cal.App.3d 723.

separate acts, rendering immaterial the question of whether a battery is a lesser-included offense of a lewd act.

The information charged counts one and three as separate acts. There was evidence that the defendant touched E.R.'s vagina multiple times, not just once. Having heard the evidence, the jury was told by the prosecutor that counts one and three were based on separate acts. Accordingly, because they were separate acts, we need not determine whether battery is a lesser-included offense of a lewd act.

The jury's not guilty verdict on count three as to the greater crime of sexual penetration does not affect this analysis. As noted, the jury was fully informed that counts one and three addressed separate acts, and the evidence was sufficient to conclude that more than one instance of touching took place, thus supporting both the lewd act and battery convictions separately.

Despite the language of the information charging separate acts, the evidence of multiple touchings, and the prosecutor's argument distinguishing the two counts, the defendant argues that "[t]he evidence clearly indicates that both offenses arose from the exact same action on the part of [the defendant]." He later backs away from the "exact same action" language and suggests "[t]he prosecution offered the same series of events on the part of [the defendant] to support both charges . . . ." The latter statement reveals the folly of the defendant's claim. Separate acts in a series of events may support separate convictions without regard to whether one is a lesser-included

offense of the other. "The proscription against multiple conviction for both a greater and lesser included offense applies only where both offenses are based upon a single act. [Citation.]" (*People v. Cortez* (1981) 115 Cal.App.3d 395, 410.)

The defendant's contention is without merit because the convictions were based on separate acts. Having so found, we need not express an opinion concerning whether battery is a lesser-included offense of a lewd act.

II

Penal Code section 654

The defendant contends that, if we do not conclude that count three (battery) must be dismissed as a lesser-included offense of count one (lewd act), then the trial court erred by imposing unstayed terms for both count one and count three because the acts supporting those counts occurred as part of one continuous course of conduct and were incident to one objective. We disagree that the sentence on count three must be stayed.

Penal Code section 654, subdivision (a) states that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

"The purpose of [Penal Code section 654's] protection against punishment for more than one violation arising out of an 'act or omission' is to insure that a defendant's punishment will be commensurate with his culpability. (See *Neal v. State*

of California [(1960)] 55 Cal.2d [11,] 20.) 'Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an "act or omission," there can be no universal construction which directs the proper application of [Penal Code] section 654 in every instance.' [Citations.]" (*People v. Perez* (1979) 23 Cal.3d 545, 550-551.)

There can be no rational argument that violating a child twice is no more culpable than violating the child once. Accordingly, imposing a term for each of the two violations is commensurate with the defendant's culpability and does not run afoul of the proscription on double punishment in Penal Code section 654.

However, the defendant quotes *Neal v. State of California*, *supra*, 55 Cal.2d at page 19, for the proposition that "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." Echoing his argument discussed in part I of this opinion, the defendant claims that the sentence on count three must be stayed because count three consisted of the same act punished in count one. Again, we disagree. There was evidence of more than one touching, and the jury was informed that counts one and three addressed separate acts.

Furthermore, Penal Code section 654 "does not prohibit the imposition of multiple punishment for separate sexual offenses committed during a continuous attack, 'even where closely connected in time.' [Citations.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 788, fn. 4.) Therefore, the trial court did not err by imposing an unstayed term for count three.

III

Statement of Reasons for Sentencing Choice

The defendant contends the trial court committed reversible error by failing to state separate reasons for imposing (1) consecutive sentences and (2) full-term consecutive sentences on counts one [lewd act -- defendant's hand on victim's vagina] and two [lewd act -- victim's hand on defendant's penis]. The contention is without merit because the defendant forfeited consideration of the issue by not objecting in the trial court.

The probation report, prepared before sentencing, stated that the defendant was eligible for full-term consecutive sentencing under Penal Code section 667.6, subdivision (c) because he was convicted of multiple sex crimes. The report recommended that the defendant be sentenced to the middle term of six years for count one and a full, separate, and consecutive middle term of six years on count two "as the defendant took advantage of a position of trust and confidence to commit the offense . . . ."

At sentencing, the trial court stated that it had read and considered the probation report and asked for argument concerning the sentence. Defense counsel acknowledged the

recommendation in the probation report and asked the court to impose lower-term sentencing instead of middle-term sentencing. After argument by the prosecutor for full-term consecutive sentencing, the parties submitted the matter.

The trial court imposed the full-term consecutive sentencing recommended by the probation report for counts one and two, stating that "the defendant took advantage obviously in a position of trust and confidence with this little girl." After imposing the sentence, the trial court asked defense counsel whether there was "anything else," and counsel said, "No . . . ."

"To the extent defendant argues the trial court failed to make a separate statement as to the reasons for imposing a full consecutive sentence, we agree with the Attorney General that he forfeited that claim by failing to raise it below. '[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons.' (*People v. Scott* (1994) 9 Cal.4th 331, 353.)" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 412-413.)

The defendant claims that he was not given an opportunity to object to the full-term consecutive sentencing. (See *People v. Scott, supra*, 9 Cal.4th at p. 356 [forfeiture does not apply

when no meaningful opportunity to object].) That is not true. First, the probation report recommended the full-term consecutive sentencing, which defense counsel did not address in argument. And second, after imposing the sentence, the trial court asked defense counsel if there was anything further, and she stated there was not.

The defendant also claims that, if this contention was forfeited by failure to make the objection in the trial court, he is nonetheless entitled to remand for resentencing because failure to object violated his right to effective counsel. This assertion has no merit because any failure to object was harmless.

"To succeed in a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's error, the outcome of the proceeding, to a reasonable probability, would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)" (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.)

It is not necessary for the court to examine the performance prong of the test before examining whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course

should be followed." (*Ibid.*) Here, we follow that course and decide the issue solely on the ground of lack of sufficient prejudice.

The defendant notes that the question of prejudice involves whether, if an objection had been made, the trial court would have run the consecutive sentence at one-third the middle term instead of a full consecutive term. He further notes that he had an insignificant prior criminal record and that the only aggravating factor stated by the trial court was that he took advantage of a position of trust.

This argument is unconvincing. The probation report listed several other aggravating factors that the trial court could have noted in sentencing: (1) the victim was particularly vulnerable, (2) the manner in which the defendant committed the crimes indicated planning and sophistication, and (3) the defendant has been convicted of multiple sex crimes. Considering these circumstances, it is not reasonably probable that, if defense counsel had objected to the sentence, the trial court would have chosen the one-third-term sentencing instead of the full-term sentencing.[2]

The defendant is not entitled to remand for resentencing.

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[2] Incidentally, this same prejudice analysis is also fatal to the defendant's claim on the merits that the trial court erred by failing to state separate reasons for consecutive sentencing and full-term consecutive sentencing.

IV

Attorney Fees and Booking Fee

The defendant contends that we must reverse the trial court's orders for him to pay court-appointed attorney fees and a booking fee. We conclude that (A) the attorney fees order must be reversed because there was no evidence he had the ability to pay, but that (B) he forfeited the issue of whether the booking fee was properly imposed.

A. *Attorney Fees*

Penal Code section 987.8 authorizes a trial court to order a defendant to contribute to the cost of counsel appointed to represent him. Subdivision (b) of that section provides in part: "In any case in which a defendant is provided legal assistance, . . . upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." Subdivision (e) states: "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county . . . ."

At sentencing, the trial court ordered the defendant to pay $3,175 in attorney fees for appointed counsel, despite the lack of evidence concerning ability to pay. In fact, the subjects of defendant's financial condition and ability to pay were never broached. As the People concede, there was no attempt by the trial court to determine the defendant's ability to pay for the

fee for appointed counsel, nor was there evidence of the defendant's financial position at the time of sentencing. Considering the defendant's 12-year state prison term, we presume he does not have an ability to pay the fee. (Pen. Code, § 987.8, subd. (g)(2)(B).)

Even though the defendant did not object to the fee, we must strike it. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [challenge to attorney fee award under Pen. Code, § 987.8 made without a hearing on ability to pay did "not require assertion in the court below to be preserved on appeal"]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215 ["We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning his own fees"].)

B. *Booking Fee*

Also at sentencing, the trial court imposed a booking fee of $321.51 (consisting of a $270.17 "main jail booking fee" and a $51.34 "main jail classification fee"), under the authority of Government Code section 29550.2. The defendant did not object to this fee.

Government Code section 29550.2 requires the trial court to impose a booking fee on a convicted defendant "[i]f the person has the ability to pay . . . ." (Subd. (a).) On appeal, the defendant argues there was no evidence he has the ability to pay the booking fee and, therefore, it must be stricken. To the contrary, failure to object forfeited consideration of the issue on appeal.

Sufficiency of evidence claims relating to fines and fees imposed at sentencing are subject to forfeiture for failure to object. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467-1469; *see also People v. Crittle* (2007) 154 Cal.App.4th 368, 371.)

The defendant disagrees, relying on *People v. Pacheco, supra,* 187 Cal.App.4th 1392. In that case, the court concluded that the defendant did not forfeit his challenge to the imposition of court-appointed attorney fees (Pen. Code, § 987.8), jail booking fees (Gov. Code, §§ 29550, subd. (c), 29550.2) and probation cost fees (Pen. Code, § 1203.1b) by failing to object to the imposition of those fees based on the trial court's failure to determine his ability to pay. We disagree with *Pacheco* to the extent it lumped booking fees together with court-appointed attorney fees.

The reasoning justifying an exception to the forfeiture rule related to court-appointed attorney fees does not apply to the failure to object to booking fees. Objecting, in the trial court, to court-appointed attorney fees presents a conflict of interest to the court-appointed counsel. (See *People v. Viray*, *supra*, 134 Cal.App.4th at p. 1216.) There is no such conflict with respect to the booking fee. There is also no statutory requirement to find unusual circumstances before imposing the booking fee as there is for imposing court-appointed attorney fees. (*See People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.)

Because booking fees do not present a conflict of interest for appointed counsel and do not require a finding of unusual

circumstances, the general rule of forfeiture applies. (*People v. Gibson, supra,* 27 Cal.App.4th pp. 1467-1469.) Therefore, the defendant forfeited his sufficiency of evidence argument by failing to make it in the trial court.

In his reply brief, the defendant attempts to add a constitutional due process challenge by arguing that imposing the fee without sufficient evidence of ability to pay violated his due process rights. For this proposition, he cites *Jackson v. Virginia* (1979) 443 U.S. 307 [61 L.Ed.2d 560], which held that a conviction not supported by substantial evidence violates due process. The defendant's suggestion that imposing a fee without evidence of ability to pay is at all similar to convicting without substantial evidence hardly merits comment. A fee is not a conviction.

DISPOSITION

The $3,175 fee for the court-appointed attorney is stricken. As modified, the judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

MAURO, J.